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No. ~~269~~. 33

In the Supreme Court of the United States

October Term, 1923.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY and THE TEXARKANA & FORT SMITH RAILWAY COMPANY,

vs.

ROAD IMPROVEMENT DISTRICT NO. 3 OF SEVIER COUNTY, ARKANSAS ET AL.

In Error and on Writ of Certiorari to the Supreme Court of the State of Arkansas.

BRIEF OF DEFENDANTS IN ERROR.

HAL L. NORWOOD,
Attorney for Defendants in Error.

E. K. EDWARDS,
J. I. ALLEY,
B. E. ISBELL,
Of Counsel.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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BRIEF OF DEFENDANTS IN ERROR.

No. 269.

STATEMENT.

The defendant Road Improvement District No. 3 of Sevier County, Arkansas, was organized on petition of the land owners of the district, under the general statutes of the state, for the purpose

of making a hard surfaced highway of the public road beginning at the depot of the Kansas City Southern Railway in DeQueen, and extending east to the boundary of the county, a distance of about 18 miles. The railway runs north and south through the county. The board of assessors of the district adopted the zone system, except as to the railroad property, which was assessed at the actual benefits, according to the judgment of the assessors. The assessed property of plaintiffs consists of two miles of main line of the railroad, which was assessed for general taxation purposes at $54,000, and the benefits were assessed at $7,000, or $3,500 per mile; also nine and three-fourths miles of sidetracks, assessed for general taxation purposes at $29,250, and the benefits assessed at $5,000; also depot buildings and other buildings, assessed for general taxation purposes at $46,365, the benefits being assessed at $9,270, the total assessment being $21,270 against plaintiffs' property. The total benefit assessment of the district is $510,033 (Rec. 144).

The total assessment for general taxation purposes of town lots and acreage property of the district is $897,660.00 and the total benefits assessed against such property is $488,763, or an average rate of 54½ per cent. The total assessed value for general taxation purposes of plaintiffs' property in the district is $129,615 and the assessed benefits $21,270, or approximately 16 per cent of its assessed value. The total assessed value for taxation purposes of the property of the DeQueen & Eastern Railroad in the district is

$93,790 and the benefits assessed against such property are $29,720, or approximately 31½ per cent of its assessed value and almost twice the rate assessed against plaintiffs' property. For the purpose of trying to make the assessments for general purposes uniform and equal, the State Tax Commission assessed plaintiffs' property at fifty per cent of its value, therefore, the benefit assessment against it is only 8 per cent of its actual value.

The assessment was filed with the County Court and plaintiffs resisted their assessment on the ground that no benefits would accrue to the railroad property from the construction of the improvement. The County Court approved the assessment and plaintiffs appealed to the Circuit Court where there was a trial *de novo* and the assessment sustained. Plaintiffs appealed to the State Supreme Court where the judgment of the Circuit Court was affirmed (Opinion Rec. 311) (*K. C. S. Ry.* v. *Rd. Imp. Dist. 3, Sevier County*, 156 Ark. 116).

After the benefit assessment was filed in the County Court the General Assembly of the state enacted a statute expressly approving and confirming the assessments on file (Act No. 98 of the extraordinary session of the General Assembly, approved February 7, 1920).

I.

Plaintiffs' Property Is Benefited by the Improvement of the Highway.

The record shows that the Kansas City Southern Railway extends from Kansas City to Port Arthur, running north and south through Sevier County and the defendant District; that the only other railroads in the county are the DeQueen & Eastern, which begins at DeQueen and runs east to a point a short distance beyond the boundary of the county, and the Texas, Oklahoma and Eastern, which begins at DeQueen and runs west to Valliant on a branch of the Frisco in southwest Oklahoma. DeQueen and Horatio, on the Kansas City Southern and Lockesburg on the DeQueen and Eastern are the principal shipping points in Sevier County; that Nashville is about 20 miles east of Lockesburg and is on a branch of the Missouri Pacific Railroad. The Kansas City Southern is known as "straight as the crow flies route" to the northern markets. It is the beneficiary of the increased traffic by reason of the highway improvement. All products shipped from the defendant District reach this railroad and are transported to Kansas City, Chicago and the other markets. If the products are hauled to DeQueen or Horatio the K. C. S. becomes the initial carrier. If products are hauled to Lockesburg they are delivered to the DeQueen and Eastern to be transferred to the K. C. S. Previous to the improvement of the highway some of the products of the district were hauled to Nashville and were shipped over the Missouri Pacific. Since the im-

provement the farmers in the eastern portion of Sevier County and the western part of Howard County take their products to Lockesburg where they are received by the DeQueen & Eastern and transferred at DeQueen to the K. C. S.

Learned counsel for plaintiffs argue that products of the district may ultimately reach the K. C. S. at DeQueen, or they may be transported over the Texas, Oklahoma & Eastern to a point on the Frisco. There is no "may or ultimately" about it. The record shows that they are transported over the K. C. S. Of course they could go west from DeQueen to a branch of the Frisco at a point further from the markets than DeQueen and would eventually reach their destination at Chicago, Kansas City, Pittsburg and other places. Counsel had as well argue that some day airships may be the means of transporting perishable fruit and vegetables and that therefore the plaintiffs will not be benefited by the increased traffic resulting from the improved highway.

T. W. Park, who had been sales agent for three years for the Lockesburg Berry & Truck Association, testified:

> "Q. Have you ever made a shipment of any of those products that were not routed over the Kansas City Southern one way or the other from DeQueen? A. I never have routed a car another way.
>
> Q. Will it ever be practical with the railroad facilities now in the county to ship and deliver the products in that community over any other route? A. Not for me; the Kansas City Southern gives me the quickest service—

quicker deliveries—and on perishable products there must be a quick delivery.

Q. And for that reason it wouldn't be practical for you to ship perishable products over any other route except the Kansas City Southern? A. No, sir" (Record 286).

Counsel for plaintiffs also argue that products of the district may move eastward to the town of Nashville and be shipped over the Missouri Pacific. The evidence shows that by reason of the improvement of the highway the farmers in the western part of Howard County are bringing their products to Lockesburg for shipment instead of Nashville as they did prior to the improvement (Rec. 290). The plaintiff is not only benefited by receiving increased shipments from the farmers of the district but receiving for shipment products from another county by reason of the improvement. We submit that positive proof of what has occurred should have more weight than supposition of counsel as to what might occur.

The record shows that the district is rapidly developing as the result of the building of the road; that the farmers are abandoning cotton and corn as crops and are growing the more profitable crops of cantaloupes, watermelons, berries, fruit and vegetables of all kinds; that the improvement of the highway affords the farmers facilities for getting these products to points of shipment in marketable condition; that by reason of this, the tonnage of plaintiffs has increased and will continue to increase, by shipment of products not

only from the district, but adjacent territory; that prior to the improvement it was almost impossible on account of the bad roads to engage in truck farming with profit. That the eastern terminus of the highway reaches the timber belt and makes it profitable and practical to move timber, staves, ties and lumber to plaintiffs' railroad. In the face of this evidence counsel argue that plaintiffs are not benefited by the improvement. It would be as reasonable to argue that the territory through which the railroad runs was not benefited by the building of the railroad. In calculating the increased receipts for shipments by reason of the improvement, counsel limits it to amounts received on some carload shipments of fruit and vegetables. At page 18 of their brief they give figures showing the amount of such shipments received at DeQueen and at DeQueen from the DeQueen & Eastern for the years 1915-18-20 and it will be noted that although the highway was only partially completed in 1920, the receipts for carload shipments for that year were approximately three times as much as for either year before the beginning of the improvement. The mere beginning of the improvement inaugurated a new era among the farmers and increased the carload shipments of fruits and vegetables two hundred per cent the first year.

In estimating the increased freight receipts that will accrue by reason of this hard surfaced road being constructed, eighteen miles at right angles to plaintiffs' railroad, counsel for plaintiffs did not take into consideration the increased tonnage of

many products of the territory and ignored entirely the vast amount of timber products made available for shipment from the virgin forests adjacent to east end of the road. They also fail to consider the increased amount of incoming traffic. People buy in proportion to their ability to pay and the incoming freight will increase in proportion to the outgoing freight.

At page five of their brief, counsel say that: "It was also testified that in this region hard surfaced roads paralleling the plaintiffs' line had taken away the local business of plaintiffs, which now moved by motor trucks, and that roads running at right angles to plaintiffs' line, such as road Number 3, would by connecting up with cross-roads, enable the trucks to reach more towns, and further decrease the local business of the railroad." We can understand that a hard surfaced road leading from some distributing point or where there are wholesale houses and running parallel with a railroad would take away some traffic from the road by reason of trucks moving the freight to other points on the railroad, but this would only apply to merchandise and not products of the territory. However, as the road in the instant case does not parallel plaintiffs' railroad, the evidence as to such roads is not applicable. We are unable to understand what produce or freight of any description would move by truck over road Number 3 and thereby deprive the plaintiffs of hauling it. The road runs east from DeQueen at right angles to the railroad and if a truck with freight traveled it to a cross road and reached

other towns they would not be points on the railroad. If trucks haul freight it will be freight that has been hauled in by the railroad and will be hauled to points not reached by the railroad. If trucks haul the products of the territory it will be to the railroad and cannot be in competition with it. These railroad experts have a set formulae by which they undertake to tell how improved highways injure the railroads and apply to it every case where they resist railroad assessments regardless of the physical facts connected with the particular case. In this connection it is well to note that only one of plaintiffs' witnesses resided in Sevier County or had ever lived there. Only one had ever been over the district. They are not familiar with the roads, the territory, the products of the country or the general conditions, or changes in conditions; they simply said that in their opinion the building of the highway would not increase the traffic and that the railroad property would not be benefited. Not one of them knew anything of the relative assessments of the property of the district. Not one could say that the railroad property was assessed higher than other property in the district, or that in making the assessment of benefits the railroad company had been discriminated against. They did not have the knowledge, nor the means of obtaining the knowledge, possessed by the witnesses for defendant, all of whom were business and professional men who had spent practically all their lives in Sevier County and were familiar with the roads and the conditions generally in the county and district.

The three assessors of the district testified that plaintiffs' property would receive benefits equal to the assessment against it. Four other witnesses testified the same. Dr. Norwood, who lives at Lockesburg and has practiced medicine throughout the district for more than twenty-five years, testified that the benefits assessed would accrue to plaintiffs' property by reason of the plaintiffs' community interests, by increasing the traffic or tonnage of plaintiffs' road and by increased valuation of plaintiffs' property. He gave the details upon which he based his statements, showing that although the road at that time had been graded but not completed, he had observed an increase in the products of the territory and observed that people who formerly hauled their produce to Nashville on the Missouri Pacific Railroad and did their trading in Nashville, were then making Lockesburg their trading and shipping point by reason of the improvement of the highway. He explained that before the improvement of the highway that at some seasons of the year, there were portions of the eastern end of it that a team could not pull an empty wagon; that it was not possible to get over the road between DeQueen and Lockesburg with a loaded truck and not practical to travel it with an automobile or truck. He testified that his office building was assessed for general taxation purposes at $3,000.00, being about 50 per cent of what it cost him in 1913, and that the defendant district assessment against it was $1,800.00; that his residence was built thirty-five years ago and is worth between fifteen hundred

and two thousand dollars; that the general assessment against it is $750.00 and the defendant district assessment $540.00. (Rec. 280-1.)

T. M. Gallaher (Rec. 296-7), T. W. Park (Rec. 285-95) and E. S. Byington (229-45) all corroborated the testimony of the assessors as to the benefit to plaintiffs' property by the improvement of the highway and gave their reasons for their evidence.

The Circuit Court that tried this cause on appeal from the County Court in summing up the evidence said: *"The witnesses for the railroad have gone very far in their statements that it would not benefit them any at all; and the testimony of the other witnesses, on the other hand, shows that there is considerable benefit. One witness stated there had been an increase of a hundred carloads of stuff in one season by virtue of this road; that some of those ran from $200 to $1.000 a car. A hundred carloads of stuff being brought to the railroad, ranging from two hundred to a thousand dollars a carload, it seems to me, controverts very strongly the testimony on the part of the railroad company that they are getting nothing." The court, addressing its remarks to counsel for plaintiffs said further: "The only fault to be found is that they have assessed other property at a greater value in proportion than they have your property. They have made an average assessment of other taxable property at 54 per cent; they have assessed yours at sixteen and a fourth per cent."* (Rec. 307-8.)

Mr. Chief Justice McCulloch, in rendering the opinion of the Supreme Court of Arkansas in this case, said: *"The testimony introduced on behalf of the district is that there will be great benefits accruing to the railroad property from the construction of the improvement, as the improved road will be a feeder to the railroad and will considerably enhance its business by the development of the contiguous and outlying territory. It is not a case of a parallel road, but one which runs out into territory which will afford access to the railroad property and augment its business. We have decided that in assessing benefits to a railroad from building a hard surfaced road, the Legislature may consider the benefit resulting from the development of the territory.* (*Hines* v. *Road Improvement District,* 145 Ark. 382.) *The Supreme Court of the United States, in Branson* v. *Bush,* 251 U. S. 182, *made the same declaration. It was said in that case that it is obvious that anything that develops the territory which the railroad serves must necessarily be a benefit to it, and that no agency for such development equals that of good roads.'* (Rec. 313.)

The commissioners and assessors of the defendant district and numerous witnesses testified that the property of the plaintiffs would be benefited as much as the assessment. The County Court, State Circuit Court and the State Supreme Court upheld the assessment. This Honorable Court says that necessarily a good road develops a territory and is a benefit to a railroad that serves the territory, but plaintiffs witnesses were of the opinion that good roads are not beneficial to rail-

roads but are very detrimental. Counsel for plaintiff take a more liberal view of the matter and after assuming certain amounts for the purpose of their calculation, insist that the total net earnings of the plaintiffs by reason of the improvement, assignable to the mileage in the district, will be sixty-two cents a year. If the contention by plaintiffs that good roads are detrimental to railroads, then, we submit, that the Federal Government is doing the railroads a great injustice by spending $75,000,000 a year for the improvement of roads.

II.

The Assessment Is Not so Plainly Arbitrary, and so Grossly Excessive as to Amount to Confiscation of the Property of the Plaintiffs.

Under the heading that the assessment is arbitrary and confiscatory, plaintiffs make the same error as they did in their statement of the case, by taking the position that some of the increased tonnage of the district may go from DeQueen to Valliant, Oklahoma, and from Valliant to Hugo, on the main line of the Frisco, and finally reach its destination. Plaintiffs have argued that the increased tonnage will be shipments of the products of what is called "truck farming," and there is no proof that such shipments have ever been routed via Valliant and Hugo. Plaintiffs interrogated witness Byington on this points as follows:

> "Q. The products that are brought in over this highway then may be delivered to the line

of road running west from the town of DeQueen, connecting at Valliant with the Frisco, and carried thence to the Northern markets? A. In a round about way, yes.

Q. But they can be? A. Yes, sir, you could ship stuff via New York to San Francisco, too, if you wanted it." (Rec. 232.)

This reply of the witness illustrated the absurdity of plaintiffs position that some of the "truck" would go via Valliant.

Plaintiffs argue further that any increase in traffic will be shared by the Missouri Pacific receiving the freight at Nashville. We have already shown that the improvement of the road in the defendant district has diverted to the plaintiffs' railroad tonnage that formerly went to the Missouri Pacific at Nashville.

In sustaining the assessment involved in the case of *Branson* v. *Bush,* this court said: *"For the district, three witnesses were called, one a doctor, one a merchant, and one a long-time resident of the village of Alma. Each of these testified that in his opinion, the road by making the village of Alma, more accessible, particularly in the wet season of the year, and by developing the adjacent country, would increase the business of the railway company, and would divert business from Van Buren, where there was a competing railroad, to Alma, where appellee had the only line."* In the instant case the proof shows that traffic has been diverted from Nashville to DeQueen via Lockesburg, where the plaintiffs have the only railroad that is a direct line to the markets.

Plaintiffs characterize the assessment as a "gross and glaring injustice" which they say come within the rule of *Kansas City Southern Railway Company* v. *Improvement District,* 256 U. S. 648, *Norwood* v. *Baker,* 172 U. S. 269 and other cases cited. With the exception of the first one, these same cases were cited and relied upon by the railroad in the case of *Branson* v. *Bush,* and were there reviewed, this court holding that they were not in conflict with the rule as laid down in the *Branson* v. *Bush* case.

The first case cited by plaintiffs, *Kansas City Southern Railway Co.* v. *Road Improvement District,* 256 U. S. 648 (case originating in Little River County, Arkansas), is not analogous. In that case the benefits assessed against the acreage property were a uniform assessment per acre, no value given to improvements; here in assessing the acreage property its value as fixed for general taxation purposes, including the improvements, were considered. In the Little River County case the benefits assessed against the town lots were uniform assessments per front foot, without giving any consideration to the location or value of the lots or the improvements thereon; here the benefits are assessed according to assessments made for county and state purposes, location, value and the improvements thereon considered. There the road to be improved was 11 miles long, running parallel with the railroad; here the road is 18 miles running at right angles. There the assessment was $67,900.00; here it is $21,270.00. There the assessment was $7,000.00

per mile, main line; here it is $3,500.00. There the only property of the railroad in the district was nine miles of main line; here there are two miles of main line, nine miles of side track, round house and other buildings of the freight division, with a total general assessment, upon a 50 per cent basis, amounting to $129,765.00 with an actual value of $259,530.00. The facts are so entirely different in the two cases that there is no similarity at all.

Plaintiffs say that the law gave the assessors no standard by which to proceed, except to assess against the property an amount equal to what such property would be benefited. We submit that if the assessors adopted a standard which produced *"approximately correct results"* it is immaterial that the law failed to lay down any "iron rules" for their guidance. Counsel say that the law did not direct that an assessment be made on area basis or an assessment basis. We submit that an area basis for railroad property would not produce a proper assessment and certainly plaintiffs cannot complain that the benefit assessment against it is not the same as the assessment against it for general taxation. If it was, the assessment would be $129,765.00 instead of $21,270.00. Counsel say that the law did not direct an assessment of benefits against the railroad property in accordance with enhanced values arising from the increased traffic caused by the improvement. We submit that the record shows that everything was considered that counsel contend should have been, therefore, plaintiffs are not prejudiced by the fact that the law did not lay down specific rules.

In the case of *Branson* v. *Bush,* the assessment involved was made by the special Act that created the district and made the benefit assessment against the property of the district the same as the county and state assessment. If the district in the instant case had been created by special Act and the same basis adopted for the benefit assessment, the assessment against plaintiffs would be $129,-765.00, more than six times as much as that fixed by the assessors of the district. Yet counsel say that "it is inevitable from the very fundamentals of human nature that the assessors in a local improvement district who are themselves property owners within the district, will be generous in lightening the burdens of the individual property owners and transferring them to railroad and other public utility property." We submit that the accusation is not applicable to the assessors of the defendant district who fixed the assessment at one-sixth of what it would have been if it had been originally made by the legislature on the same basis as was made in the district involved in the case of *Branson* v. *Bush.* Counsel do not suggest who should fix benefit assessments. Naturally if they are fixed by a board they should be men who are familiar with the local conditions and, therefore, would be residents of the district.

The Fourteenth Amendment Was Not Intended to Compel the States to Adopt an Iron Rule of Equal Taxation.

In the case of *Branson* v. *Bush, supra*, this court said: *"No attempt was made to prove fraudulent or capricious or arbitrary action on the part of any officials in making the assessment, the only evidence on the subject being the opinion of four employees of the Company that the improvement of the road would not benefit the railroad property, and if inequality has resulted from the application of the state law in a customary manner to a situation frequently arising in our country, it is an incidental inequality, resulting from a valid classification of railroad property for taxation purposes, which does not fall within the scope of the Fourteenth Amendment, which was not intended to compel the states to adopt an iron rule of equal taxation."* Citing the following cases:

Bell's Gap R. Co. v. *Pennsylvania*, 134 U. S. 232.
French v. *Barber Asphalt Paving Co.*, 181 U. S. 324.
Cass Farm Co. v. *Detroit*, 181 U. S. 396.
Detroit v. *Parker*, 181 U. S. 399.

There is no more proof in the instant case of fraudulent capricious or arbitrary action than was in the case of *Branson* v. *Bush*. It is true that some of the employees of plaintiff testified that the railroad would not be benefited by the improvement but we submit that *"testimony can have no force when it is in direct confict with the physical*

facts and to believe it would involve an absurdity in reason and common experience."

Waters-Pierce Oil Company v. *Knisel,* 79 Ark. 608.

"A highway is an improvement justifying a local assessment against a railroad."

St. Louis & S. F. R. Co. v. *Ft. Smith & V. B. Bridge District,* 113 Ark. 493.
Missouri P. R. Co. v. *Conway County Bridge Dist.,* 134 Ark. 292.
Oates v. *Cypress Creek Drainage Dist.,* 135 Ark. 449.
Missouri Pacific R. Co. v. *Monroe County Imp. Dist.,* 137 Ark. 568.

The Federal Supreme Court will not interfere with improvement district assessments on constitutional grounds where the state authorities have upheld the assessments, and the action of the state authorities cannot be said to be arbitrary or wholly unequal in operation and effect.

Goldsmith v. *Prendegrast Constr. Co.,* 252 U. S. 12.
Withnell v. *Ruecking Constr. Co.,* 249 U. S. 63.

Counsel for plaintiffs complain because the assessors in making the benefit assessments against the acreage property, generally accepted the general assessment as the value of the property, without giving consideration to the improvements, unless the assessors knew that the improvements had been put on the land since the last assessment. We

submit that the assessors were correct in this, because the law requires the county tax assessor, when assessing property for state and county taxation, to add to the value of every tract of real estate the value of the improvements made thereon since the previous assessment. The assessors of the defendant district were right in assuming that all improvements had already been considered by the county assessor in his assessment and therefore did right not to consider improvements separately, unless they knew that such improvements had been made after the last assessment by the county assessor. Any other procedure would have been erroneous.

Counsel, at pages 33-34 of their brief, set out part of the evidence of one of the assessors to the effect that benefits were estimated upon the assumption that there would be increase of traffic to the railroad of plaintiffs by reason of the improvement. We submit that this was a reasonable and logical presumption.

"The value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated."

R. R. Company v. *Backus*, 154 U. S. 439.

As a reason for contending that there can be but little prospective development of the territory and resulting profits to plaintiffs, counsel at page 4, say that "the district has been settled many years, and a large part of the available land is already in cultivation." In concluding their argu-

ment on their first assignment of error, they say, at page 22, that "It is a subject of great importance not only to the plaintiffs but to all common carriers located in a country in the *progress of development.*" From these conflicting statements we are unable to understand just what is the opinion of counsel regarding this territory. The truth is that while the country around DeQueen and Lockesburg is settled, there are probably not a dozen houses in view of the road on a ten-mile stretch of it between the two towns.

There is nothing alarming about this matter and no probability that any railroad property is going to be confiscated by existing or prospective improvement districts. It is true, as stated on page 2 of plaintiffs' brief, that the estimated cost of the improvement was $200,000 and the total assessed benefits are $510,033, but the property of the district will never pay any more than the cost of the improvement and the interest on the bonds. If the assessment of benefits was a million dollars it would not cost the taxpayers any more. The tax levy is based on the total assessment and the more the assessment the less the per cent levied. Since this cause has been pending the General Assembly of Arkansas, at an extraordinary session, enacted a statute providing for a comprehensive system of constructing state highways and for paying part of the bonded indebtedness incurred by improvement districts for the construction of roads. (Act No. 55—Approved October 10, 1923.)

The statute provides for certain motor vehicle license and levies a tax on gasoline and oil, all of

the funds to be used for highway purposes. It appropriates $3,000,000.00 annually to be apportioned to the several counties according to population. The counties are classified and in some of the counties all of the funds will be used toward paying the existing bonded indebtedness of the road improvement districts. In Sevier County, where the defendant district is located, all of the funds apportioned to it will be applied to the existing debts of the road improvement district, including the debts of the defendant district. In some of the counties a certain per cent will be applied to existing indebtedness and the balance to construction of new roads. The Act further provides that hereafter no road improvement district shall undertake the improvement of roads where more than 50 per cent of the construction cost shall be collected from taxes on the property of the district. When we consider that Sevier County's part of the three million dollars annually, is going to pay a large portion of the indebtedness of the defendant district, and the further fact that the benefit assessment against plaintiffs was a pro rata part of an assessment far in excess of the cost of the improvement and that even without state aid to the district, plaintiffs would never have been required to pay the full amount of the assessment but only its actual pro rata part of the indebtedness, we can see that the amount that plaintiffs will contribute will not be very much and not burdensome when distributed over a period of twenty years. Probably not $200.00 a year. Of course, this remedial highway legislation of the state is no reason why

the assessment against plaintiffs should be sustained and no reason why it should be reduced, because, regardless of the future state aid toward the liquidation of the highway indebtedness, the present assessment against plaintiffs should stand in order that they may pay their pro rata part of whatever must be collected from the property of the district. The matter will adjust itself by reduced percentage that is levied from year to year upon the assessments.

Plaintiffs, at page 22 of their brief, say that "Not only Arkansas but other states have embarked upon an extensive program for road improvement," and then counsel sent out an S. O. S. call for the relief of railroads from what may happen by excessive assessments made by improvement districts. It is in answer to that statement that we have called attention to the recently adopted program for highways upon which Arkansas has embarked and to show that it is an entirely different program to that previously followed and that any fear of the dire anticipated calamity that may befall railroads from highway taxes has been eliminated by the new system established. We are not mentioning the new system by way of apology for the old system but to allay the fears of counsel for plaintiffs for what they predict may happen under a system that has been practically abolished. Since the state has created a new source of highway revenue and provided that the state shall construct new highways and maintain those already built and pay part of the indebtedness now existing against the road improvement districts, it is

not likely that any more road improvement districts will be created, even to pay one-half the cost of such improvement.

III.

The Use by the Local Assessors of the State Tax Commission's Assessment of Plaintiffs' Railroad Property, as the Basis for the Assessment of Benefits, Was Not Arbitrary and Wrong, but Fair and Just and Absolutely in Accord with the Decision in the Case of Branson v. Bush, 251 U. S. 181.

Plaintiffs' second assignment of error is that the value of the tangible property of plaintiffs in the district could not be benefited by a prospective increase in traffic and, therefore, the use by the assessors of the State Tax Commission's assessment of plaintiffs' railroad property, which included both tangible and intangible values, as the basis for the assessment of benefits, was arbitrary and wholly unwarranted.

In arriving at the benefits to assess, the district assessors took into consideration the value of all property as fixed for general taxation. Where the property had been assessed by the county assessor, such assessment was considered. The State Tax Commission having assessed the tracks and buildings of plaintiffs, this assessment was taken as the value of such property.

The assessment involved in the case of *Branson* v. *Bush, Supra,* was made by the Legislature and

the benefit assessment against the railroad property was fixed absolutely the same as the assessment against such property as fixed by the State Tax Commission. If the Legislature had the right to adopt such assessment as the benefit assessment then the assessors of the defendant district had the right to consider the same kind of an assessment in arriving at the value of plaintiffs' property.

In the case of *Branson* v. *Bush,* Supra, the court said:

> "If, however, the distinction sometimes taken between the 'essential properties of corporate existence' and the franchise of a corporation (*Memphis & L. R. R. Co.* v. *Railroad Comr.,* 112 U. S. 609) be considered substantial enough to be of practical value, and if it be assumed that the distinction was applied by the state commission in making the assessment involved, this would result, not in adding personal property value to the value of the real estate of the company in the district, but simply in determining what the value of the real estate property was, its right of way, tracks and buildings, having regard to the use which is made of it as an instrumentality for earning money in the conduct of railroad operations. This, at most, is no more than giving to the real property a value greater as a part of a railroad unit and a going concern than it would have if considered only as a quantity of land, buildings and tracks. This is the method of assessing railroad property often approved by this court, specifically in *Cleveland C. C. & St. L. R. Co.* v. *Bacus,* 154 U. S. 139. 'The rule of property taxation is that the value of the property is the basis of taxation. It

does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of the property results solely from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the use to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much to another. And long experience has confirmed the statement by Mr. Justice Miller in State Railroad cases, 92 U. S. 575, that 'it may well be doubted whether any better mode of determining the value of that portion of the track within one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.' And see Kentucky Railroad cases, 115 U. S. 321, in which, also, the contention is disposed of that the railroad track should be valued by the same officials and on the same basis of acreage and farm lands adjacent to it. Thus, the assessment complained of was made under valid laws and in a manner approved and customary in arriving at the value of that part of the railroad tracks situate in a state, county, or district. So far as this record shows, the assessment modified by the decree of the District Court, not appealed from, is not a composite of real and personal property values, but it is the ascer-

> tained value of the real estate—the tracks and buildings— of the company within the taxing district, enhanced, no doubt, by the special use made of it, but still its value as a part of the railroad unit, resulting from the inherent nature of the business in which it is employed—a value which will not be resolved into its constituent elements for the purpose of defeating contribution to a public improvement."

Plaintiffs' second assignment of error raises absolutely the same question that was decided in the foregoing opinion and we deem further reference to it unnecessary.

IV.

The Assessment of Benefits Against the Property of Plaintiffs Is Not Relatively Unequal and Discriminatory Because Not Made on a Uniform Basis as Compared with the Assessment of Other Property.

Plaintiffs under their third assignment of error, argue first that the district assessors did not consider improvements on town lots and acreage property unless the improvements had been made since the last assessment of the property. We have already explained that every year the county assessor adds to the value of each tract the value of the improvements made since the prior annual assessment, and it was for this reason that the district assessors did not consider improvements

that were made prior to the annual assessment by the county assessor.

Complaint is also made that the benefit assessment against plaintiffs' main track is 12 per cent of the assessed value, 17 per cent against side tracks and 19 per cent against buildings or an average of 16 per cent. We submit that this is wholly immaterial. Plaintiffs will not pay any more taxes than would be required if the percentage had been uniform against the main line, side tracks and buildings. If, as said by counsel, the assessors "lumped off" this assessment against plaintiff, they got "lumped" for less than any other tax payer of the district. Plaintiffs' benefit assessment is 16 per cent of the assessed valuation of their property, while the assessment against the DeQueen and Eastern Railroad is 31½ per cent and all other property of the district 54½ per cent of the assessed valuation.

Counsel call attention to the fact that the tracts of land shown on page 32 of the record are assessed on an average of $4.13 an acre. If they had turned to other pages they would have noticed that the assessment per acre on the average is a great deal more. At page 52, we find the following:

John Winkeham,	20	acres,	Assessment...	$300.00
H. R. Johnson	80	"	" ...	800.00
J. R. Hopson	80	"	" ...	650.00
Same	160	"	" ...	1300.00
W. E. Clark	5	"	" ...	300.00
J. B. Lowery	5	"	" ...	80.00

At page 62, the following appears:

Arthur Bandy,	10	acres,	Assessment.	$300.00
Nora Wilder	4	"	"	400.00
T. W. Graves	2½	"	"	300.00
Arthur Bandy,	5¼	acres,	Assessment.	450.00
So. Land & T. Co.	3.68	"	"	100.00
D. & E. R. R. Co.	6½	"	"	180.00
R. A. Gilliam	7	"	"	100.00
J. C. Arnold	¾	"	"	300.00
Laura Aubrey	1.12	"	"	50.00

Or turn to page 72 and we find the following:

Jno. F. Cox,	.60	acres,	Assessment.	$200.00
W. D. Shannon	2½	"	"	400.00
Sarah Wilson	3.30	"	"	150.00
Geo. Holman.	3	"	"	500.00
Jim Neal	1	"	"	100.00
D. H. Harris Est.	10	"	"	400.00
E. C. Skinner Est	1	"	"	250.00

It is very misleading to select one page of the assessment record and strike an average of the assessed value per acre for the purpose of trying to show that the acreage property of the district is very much under-valued.

Counsel also contend that the assessments of property in the several zones does not amount accurately to 40 or 50 or 60 per cent. We submit that this is no concern of plaintiffs. If some farmer's land is assessed four or five per cent higher than his neighbor he had the oportunity to appear and make complaint. If the other property of the district is paying its just pro rata of taxes, plaintiffs are not prejudiced if the burdens are not borne equally as between the others.

Counsel complain because after the assessment was filed, the county court upon objections being filed, made a 40 per cent reduction on some property in the town of DeQueen, and that the record does not state why the reduction was made. Plaintiffs do not undertake to show that the reduction should not have been made. It may be that this acreage property and town lots were in several of the road districts that begin at DeQueen and that plaintiff's property is not in as many districts as the reduced property, or, if in as many districts, that it is benefited by each improvement in proportion to the benefits assessed in each, whereas the improvement by defendant district would not benefit the property in the town of DeQueen as much as the benefit assessment as originally filed. It may be that the county court was of the opinion that town lots in DeQueen would not be benefited as much in proportion to their assessed value as town lots in Lockesburg, because the improvement extending through and beyond Lockesburg, would bring to it trade that had been going to Nashville and the improvement would furnish the people of Lockesburg a good road to DeQueen, the county seat and the principal town of the county, and on the only trunk line railway through the county. It may be that the county court took the position that farm lands would be benefited more in proportion to the assessed value than Lots in DeQueen, because the farmers would be provided with a road over which they could market their products. Numerous reasons can be offered why the reduction should have been made. Since plaintiffs' property

is not required to be valued on the same basis as acreage property or town lots, the reduction on the property mentioned does not invalidate the assessment against plaintiffs. At all events the plaintiffs have not undertaken to show that the reduction was not proper and just. There was no reduction upon the property of the other railroads or other public service companies.

Counsel after objecting that the assessment against lots and acreage property in the town of DeQueen were reduced by the county court, proceed to argue that the assessment against some of the lots are excessive, and specify three lots upon which the benefit assessments are in excess of the general assessment of value. It is perfectly apparent that on the three lots mentioned, buildings had been erected between the time that the county assessment was made and the time of making the benefit assessment, and the district assessors took into consideration the value of the lots as enhanced by the improvements, therefore, the benefit assessment is in excess of the value as placed on the naked lots by the county assessor. Counsel point to three lots where the benefit assessment is from five to fifteen per cent of the assessed value. This was explained by one of the assessors, who stated that this was a clerical error made by placing two of the figures in the cent column instead of the dollar column. (Rec. 250.) Naturally, some mistakes will occur in a matter of this kind when there so many assessments to record. Some errors may have been made in transcribing the record. No doubt these clerical errors have long ago been corrected.

Even a few instances of unequal assessments would not invalidate the whole assessment. No assessment is ever perfect. The law makes adaquate provision for the correction of errors and for re-assessments.

"An assessment will not be held void because there may not be an exact and mathematical relation between the cost and benefit in particular instances."

Butters v. *City of Oakland,* U. S. Adv. Ops. 1923-24, p. 13.

"Absolute equality is impracticable in taxation, and is not required by the equal protection clause of the Constitution."

Maxwell v. *Bugbee,* 250 U. S. 525.
St. Louis S. W. R. Co. v. *Arkansas ex rel. Norwood,* 235 U. S. 350.
Withnell v. *Rucking Constr. Co.,* 249 U. S. 263.

Acreage basis is not proper for assessing benefits to property or plaintiffs.

Counsel devote considerable space to their calculations, in an effort to show that plaintiffs property is assessed more per acre than the other property of the district. The uses to which plaintiffs' property is put and the manner in which it will be benefited, is so entirely different to that of the other property, that an area assessment would be absurd. This Honorable Court has so recently and so often decided against the position of plaintiffs upon this point, that we would not reply to it, but

for the purpose of showing that even if an "area" basis was proper, plaintiffs property being located in DeQueen, should be assessed on the same basis as the other lots in the town are assessed.

Counsel are in error in assuming that all the area within the corporate limits of DeQueen and Lockesburg, is platted property. There is much acreage property. The record shows that there are 94 blocks in DeQueen, which would be approximately 100 acres instead of 500 acres as stated by counsel and the assessment per acre is $700.00 instead of $148.71. There are 61 blocks in Lockesburg. The blocks are 200 feet square and less than one acre to the block, therefore, there are less than 61 acres of platted property in Lockesburg, instead of 600 acres, and the benefit assessment is $531.50 per acre instead of $53.15, as stated by counsel. Counsel have called attention to the fact that there are 798 inhabitants in Lockesburg. If Lockesburg contained 600 acres of platted land there would be 4,800 platted lots, or six times as many lots as there are inhabitants.

Counsel in estimating the number of acres occupied by plaintiffs in DeQueen, limits the calculation to two miles of right of way, 100 feet wide, approximately 24 acres. Counsel do not take into consideration the area occupied by the side tracks, shops, round house and other buildings connected with their freight division. Even upon an area basis, plaintiffs are not assessed as much as the platted property in DeQueen that adjoins property of the plaintiffs. And in arriving at the average assessed benefits per acre to the farm prop-

erty as shown on page 47 of plaintiffs brief, it is not fair to select a limited number of the tracts, and especially to select tracts of ten acres or more. The record shows that tracts under ten acres are assessed proportionately much higher per acre. This is because the improvements are added and it makes the smaller tracts figure much more per acre.

"Railroads differ in so many respects from other properties that they may as a class be taxed differently or additionally, if that is not inconsistent with the Constitution of the state."

Southern Ry. Co. v. *Watts et al,* S. C. R., Vol. 47, 192.

There is no double assessment against plaintiffs' property.

At page 43 of plaintiffs' brief is mentioned four pieces of property upon which it contended that there is a double assessment. At page 141 of the assessment record will be found the following:

Name	Subd. Land.	Acre.	Pres. Value.	Corrected Benefit
Tex. F. S. Ry. Co.	All W of K. C. S. NW NE.	16	$300.00	$150
Same	A strip of land 200 ft. wide along K. C. S. Ry., NW NE.	6	80.00	40
Suduth, P. H.	E 18 A NW NE.	18	200.00	100
Tex. Ft. S. Ry. Co.	All W of K. C. S. R. in SW NE½.	24	600.00	300
K. C. S. S. R. of Way.		5	100.00	50
K.C.S. Ry. Co. & T. & F. S. Ry. Co.	W. 935 ft. of SE¼, except R. of W. heretofore named.	45.40	1600.00	960

The extension of the $50.00 assessment against five acres described as right of way is evidently an error. The number of acres, value and assessment, show that it was not intended as a benefit assessment against plaintiffs right of way property. The acreage property was copied from the books of the county assessor and such officer does not assess the right of way of railroads. There has evidently been something omitted from the description of the five acre tract. In the lower courts there was no question raised concerning this assessment and no opportunity afforded the assessors to explain it. The acreage property above described was properly assessed. There is no proof that it was listed by plaintiffs with the State Tax Commission or that it was considered by the Commission in making its assessment of plaintiffs property that is used for railroad purposes. We find that one parcel is described as "W 935 ft. of SE¼ except right of way." This shows that it was not intended to assess the right of way. If plaintiffs had shown in the lower courts, when called upon to make complaint of any errors in their assessments, that any property was doubly assessed, correction would have been made. No such complaint was made. Plaintiffs resisted the assessment on the grounds that they were not benefited by the improvement. Plaintiffs cite the case of *Railway Company* v. *Bridge District*, 239 Fed. 729, where the court found that the evidence showed that the assessors had assessed fourteen acres of the railroad's land, ten acres of which were used as terminal yards, containing

round house, etc. There is no proof that this acreage property is used for railroad purposes. Counsel say that: "An examination of the record shows that in addition to the benefit assessment assessed against plaintiffs and which are complained of in this suit, *there were also other assessments of benefits against lands of the plaintiff.*" Counsel concede that no complaint was originally made about the assessment on the lands described as acreage property or the five acres described as right of way. They cannot raise this question here for the first time.

"Errors not assigned on appeal to the highest state court will not be considered by the Federal Supreme Court on writ of error."

Bullen v. *Wisconsin,* 240 U. S. 625.
Chicago I. & L. R. Co. v. *Hackett,* 228 U. S. 559.
Selover & Co. v. *Walsh,* 226 U. S. 112.

As we have stated there is no double taxation of plaintiffs' property, but even if there is, it does not contravene the Fourteenth Amendment.

"The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of the tax, short of confiscation or proceedings unconstitutional on other grounds."

Ft. Smith Lumber Co. v. *State of Ark. ex rel,* Arbuckle, Attorney General, U. S. 64 Law Ed. 532.

Plaintiffs object here, for the first time, that church, school, county and city property was not assessed. They had just as well object because the cemeteries of the district are not assessed. All public property is exempt from such assessments. The Supreme Court of Arkansas holds that an assessment benefit for local improvements is not a tax within the sense that the term is used in constitutional provisions regulating the assessment and collection of taxes and exempting certain property from taxation, but that property of the state and all of its political subdivisions are exempt from improvement district assessments, because to levy such a tax or assessment upon such property would render necessary new taxes to meet the demands of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed whose compensation would go to increase the useless levy.

Board of Improvement v. *School District*, 56 Ark. 354.
Ahern v. *Improvement District*, 69 Ark. 68.

Church property not being used for government purposes is subject to the assessment provided it is benefited by the improvement. It will be presumed that those clothed with the authority to make the assessment decided that church property was not benefited, and in the absence of any showing by plaintiffs that it was benefited, they cannot complain.

At pages 45-7 of their brief, counsel again discuss the assessment of the farm lands of the district. We do not deem it essential to discuss this proposition further than to call attention to the erroneous statement that one of the assessors testified that "the farm lands were worth $25.00 to $50.00 per acre." The witness stated that *the best, highest priced and best improved lands in the district* were worth from $25.00 to $50.00 per acre (Rec. 376). There is a vast difference between what the witness said and what plaintiffs quote him as saying. Some of the land is assessed at more than fifty dollars an acre.

Counsel are again in error in quoting Witness Grady, one of the assessors, that his land was worth $50.00 an acre. He testified that it was worth that before the overflow but not so much since then; that his forty acres with no buildings on it and only fifteen acres in cultivation was assessed at $300.00 and the benefit assessment was $180.00. Let us assume that his land is worth $2,000.00 or $50.00 an acre, then under the rule in Arkansas of making assessments on a 50 per cent basis, the assessed value would be $1,000 and his benefit assessment being $180.00, is 18 per cent of that amount. Plaintiffs' property is assessed at 16 per cent of its value as per assessment made on a 50 per cent basis. Calculated either upon the basis of assessment for general taxation purposes or upon actual values, plaintiffs' benefit assessment is less than any property owner in the district. As compared with other property in either DeQueen

or Lockesburg, upon an acreage basis, plaintiffs' assessment is the least.

The record shows that there was an honest effort to make a fair and just benefit assessment against the property of the district. If there was any discrimination the plaintiffs are the beneficiaries. There is no proof of any "fraudulent, capricious or arbitrary action" on the part of any of the officials of the district in making the assessment.

The findings of the State Supreme Court that the Assessment of benefits against the property of the defendant is not excessive, will not be disturbed by the Federal Supreme Court on writ of error.

Waters Pierce Oil Co. v. *Texas*, 212 U. S. 86.
Rankin v. *Emich*, 218 U. S. 27.
Willoughby v. *Chicago*, 235 U. S. 45.

Certainly it cannot be said that there has been "a discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law." If the assessment in this case will not produce "approximately correct general results," then it is impossible to make an assessment that will do so.

The benefit assessment in this case is less, proportionately, to the other property in the district, than it would have been if the assessment had been made on the same basis as was made by the assessment approved in *Branson* v. *Bush, supra.* Therefore plaintiffs cannot complain that the

statute laid down no iron rules to govern the assessors.

An attack upon constitutional grounds because of the system adopted in making an assessment can only succeed if it has produced results as to plaintiffs in error's property palpably arbitrary or grossly unequal.

Withnell v. *Ruecking*, 249 U. S. 263.

V.

The Special Act of the Legislature of Arkansas Confirming the Assessment of Benefits Cured Any Defects in the Assessment.

The assessment was approved by Act No. 98, of the General Assembly of the State of Arkansas, approved February 7, 1920. The sections relating to the assessment read as follows:

> "Section 2. The assessment of benefits in said Road Improvement District Number Three of Sevier County, now on file with the county clerk of the county, as confirmed by the order of the county court of that county on November 21, 1919, and found and declared to be equitable and just, and fairly to represent the benefits that will accrue to each tract and parcel of land and right of way in said district, from the making of the improvement therein, and each of said assessments of benefits is confirmed and made the assessment of benefits in said district.
>
> Section 3. The improvement in said Sevier County Road Improvement District Number

> Three, as shown by report of the commissioners therein to the county court, filed July 15, 1919, and approved by the order of the county court on that date, are approved and confirmed. The commissioners are ordered and directed to make the improvement in accordance with said plans; and the confirmation of the assessment of benefits and the finding of the benefits in said district made by this act, are based on the improvement to be made according to said plan."

It has been repeatedly held that the Legislature may assess the benefits in an improvement district or may confirm assessments as made by the assessors.

It will be observed that the Act is broader in its scope and effect than a mere "curative" statute. It is similar to the Act construed by the Supreme Court of Arkansas in the case of *Davies* v. *Chicot County Drainage District*, (112 Ark. 360), where the court, quoting from the opinion in the case of *Sudberry* v. *Graves* (83 Ark. 344), said: "It is broader than a mere curative act in its scope and effect. It is equivalent to a declaration that the amount assessed by the viewers and approved by the county court were proper according to the benefits to be received by each tract of land, and a legislative adoption of those amounts as a re-assessment of the proportionate part as the cost of the improvement to be paid upon those lands. The Legislature had the power, in the first instance, not only to fix the boundaries of the district but to determine the cost of the improvement and to

assess the cost proportionately upon the several tracts of land according to the legislative estimate of benefits, without delegating to any subordinate board, or officers, the duty and power of fixing the assessment. (*Coffman* v. *St. Francis Drainage District,* 83 Ark. 54. *Parsons* v. *District of Columbia,* 170 U. S. 45.) In other words, the Legislature could in the first place have levied the assessment itself, subject only to the right of the assessed land owner to have an arbitrary abuse of that power reviewed by the courts, and it can therefore adopt as correct the assessment made by the viewers and county court, treating the act of adoption as a re-assessment of the lands by the Legislature. We see no reason why the Legislature can not, if it had the power in the first place to determine for itself the proportionate amounts to be assessed against the lands in the district, determine now that the apportionment made by the viewers and confirmed by the county court was correct and assess them against the land."

It would be absurd to hold that the Legislature could in the first instance make the assessment, but could not confirm or adopt an assessment made by the assessors of the district and approved by the county court. Such approval by the Legislature is tantamount to an assessment by the Legislature in the first instance.

Tims v. *Mack,* (147 Ark. 112).

Counsel cite the case of *Thibault* v. *McHaney*, (119 Ark. 188), where the court held unconstitutional a validating act, *because the uncontroverted evidence showed that the cost of the improvement exceeded the benefits. That decision is not in point in the instant case at all.*

It is not contended here that the cost of the improvement will exceed the benefits.

In the case of *Coffman* v. *St Francis Drainage District* (83 Ark. 54), cited by counsel, the plaintiff filed a complaint in equity against the assessment made against his land by the act creating the district, alleging that the ditch would render his land valueless and unfit for cultivation.

The Supreme Court held that the lower court erred in sustaining a demurrer to the complaint. There is no contention here that the road improvement will render the railroad property "valueless and unfit for use."

Counsel cite the case of *Kirst* v. *Street Improvement District* (86 Ark. 1), where the court held that the evidence showed that the assessment was made upon a frontage basis, entirely excluding the valuation of the property. The court said: "In determining the benefits to accure to each piece of property in an improvement district, as required by Kirby's Digest, Sec. 5677, the assessors are required to make a fair and just estimate of the benefits which each tract of land, including buildings, will receive by reason of the improvement, and may adopt a precentage of the valuation of the property, including the buildings, as the value of the benefits, if in their judgment such

a method best reaches the true measure of benefits thereto, *or may adopt any other method that will reach the same result.*"

In the case of *Peay* v. *City of Little Rock* (32 Ark. 31), cited by counsel, the court held that an ordinance creating a Municipal Improvement District was invalid, because it made the assessment according to frontage instead of value and was therefore in conflict with the State Constitution of 1868, which was in effect at that time. The statute now under consideration, the assessment thereunder and the act confirming the assessment, do not conflict with any provisions of the present Constitution of the State. Furthermore the decision in *Peay* v. *State,* was, in effect, overruled by the decision in the case of *Board of Improvement* v. *School District* (56 Ark. 354), and *Davis* v. *Gaines* (48 Ark. 370). The later cases holding that assessments and taxes do not have substantially the same meaning.

Counsel for plaintiffs cite the case of *Road Improvement Dist.* v. *Missouri Pacific Railway* (275 Fed. 600), as their authority for the position that a Legislative approval of an assessment by the board is not tantamount to an original assessment by the Legislature, because the action of the board is in its nature judicial, in such a sense that property owners are entitled to a hearing before the questions are determined.

The Supreme Court of Arkansas has decided in numerous cases that:

> "The function of the board of assessors of a road improvement district in assessing bene-

fits, and of the board of commissioners in adjusting them, is not judicial in the ordinary sense, but in the nature of a legislative power."

Monett Road Imp. Dist. v. *Dudley,* 144 Ark. 169.
Missouri Pacific Railway Co. v. *Izard County Highway Imp. Dist.,* 143 Ark. 261.
Payne v. *Road District,* 149 Ark. 491.

In this case the Supreme Court said:

"An affirmance of the judgment in this case might be rested entirely on the confirmation of the assessment by the statute cited above. There is no reason why the statute is not applicable, for we have decided that even during the pendency of litigation a statute may be enacted ratifying and confirming assessments.' (Rec. 312.)

"In the exercise of the appellate jurisdiction of the Federal Supreme Court over State Courts, the former court is bound by the construction of a State Law adopted by its court of last resort."

Ward & Gow v. *Krinsky,* 259 U. S. 503.
Thornton v. *Duffy,* 254 U. S. 361.
Farncomb v. *Denver,* 252 U. S. 7.
Munday v. *Wisconsin Trust Co.,* 252 U. S. 499.
Wagner v. *Lesser,* 239 U. S. 234.

Defendants do not contend that an assessment for an improvement made by the Legislature or

the confirmation by the Legislature of an assessment made by the assessors of the district, is in every case absolutely final, but that such legislative determination cannot be assailed under the Fourteenth Amendment, unless it is shown that such action is

"Arbitrary, wholly unwarranted, a flagrant abuse, and by reason of its arbitrary character a confiscation of particular property."

Branson v *Bush*, 251 U. S. 151.
Wagner v. *Leser*, 239 U. S. 207.
Houck v. *Little River Drainage District*, 239 U. S. 254.
Withnell v. *Rueckling*, 249 U. S. 263.
Hancock v. *Muskogee*, 250 U. S. 454.
Embree v. *Kansas City & L. B. Road Dist.*, 240 U. S. 242.
Kansas City So. Ry. Co. v. *Road Improvement Dist.*, 256 U. S. 661.
Goldsmith v. *Prendegrast*, 252 U. S. 12.
Thomas v. *K. C. S. Ry. Co.*, 261 U. S. 481.
Baker, Receiver v. *Druesedow, Collector*, U. S. Adv. Ops., 1923-24, page 53.
Butters et al. v. *City of Oakland*, U. S. Adv. Ops. 1923-24, page 43.

Assessments will be sustained unless arbitrary and unjust.

Gibson v. *Spikes*, 143 Ark. 270.
Bennett v. *Johnson*, 130 Ark. 507.
Hines v. *Road Imp. District*, 145 Ark. 382.
Reisinger v. *Road Imp. Dist.*, 143 Ark. 341.
Marshall v. *Baugh*, 133 Ark. 64.
Van Hook v. *Wallace*, 143 Ark. 203.
Patterson v. *Road Imp. Dist.*, 143 Ark. 44.

Missouri P. R. Co. v. *Izard County Highway Dist.*, 143 Ark. 261.
Wilkinson v. *St. Francis Co. Road Imp. Dist.*, 141 Ark. 164.
Missouri Pac. R. Co. v. *Monroe County Road Imp. Dist.*, 137 Ark. 568.
Nettles v. *Hazelwood Road Imp. Dist.*, 144 Ark. 632.
Tims v. *Mack*, 147 Ark. 112.

In local matters this court is loathe to interfere with the public policy of the respective states.

Franch v. *Barber Asphalt Paving Co.*, 181 U. S. 324.
Nickel v. *Cole*, 256 U. S. 222.
Schneider v. *Gast Realty & Investment Co.*, 245 U. S. 288,
Thornton v. *Duffy*, 254 U. S. 361.
Pa. R. Co. v. *Towers*, 245 U. S. 6.
Wells F. & Co. v. *Nevada*, 248 U. S. 165.
Green v. *Frazier*, 253 U. S. 233.
Pure Oil Co. v. *Minnesota*, 248 U. S. 158.

Plaintiffs' property was assessed under a valid statute of the state. A statute that has been construed and upheld in the numerous cases cited. The assessment was confirmed by the Legislature and this was tantamount to an assessment originally by the Legislature. The assessors made an honest effort to apportion the assessment in proportion to the benefits that the property would receive by reason of the improvement. It may not be mathematically correct but the general results will be approximately correct. Plaintiffs were

given notice and were heard when the assessment was presented to the county court for approval. They were heard in State Circuit Court and the State Supreme Court. In every forum it has been held that the assessors did not act arbitrarily. Before plaintiffs are entitled to relief it must be believed that they have shown that the State Tax Commission wrongfully assessed their property for general taxation and that the county assessor wrongfully assessed the other real estate of the district for general taxation; that the assessors of the defendant district acted arbitrarily and in a manner wholly unwarranted and that the assessment will confiscate plaintiffs' property. In other words that everybody is wrong except the plaintiffs. Plaintiffs' assessment is less in proportion than any other property owner of the district. Less than the other railroad property of the district. Less than the other public utility property owners. Less than town lots adjacent, whether calculated on assessed values or an area basis. Less than farm lands when calculated on a basis of value. Less in proportion to the benefits to its property, by reason of the improvement. The facts are entirely different to the facts in the case of plaintiffs against the Little River County Improvement District (256 U. S. 661). The facts are more like the case of *Branson* v. *Bush* (251 U. S. 181). The assessment is not as high proportionately against plaintiffs as it was against the railroad in the *Branson* v. *Bush case*. There the assessment for general taxation purposes was the basis for the benefit assessment for all the

property of the district. Upon the same basis plaintiffs' property is assessed less than half of the other railroad property of the district and not one-third as much as the farm lands and town property.

We respectfully submit that the decision in this case should be affirmed.

Respectfully submitted,

HAL L. NORWOOD,
Attorney for Defendants in Error.

E. K. EDWARDS,
J. I. ALLEY,
B. E. ISBELL,
Of Counsel.